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No. 78-1561

In the Supreme Court of the United States

OCTOBER TERM, 1978

DAN CALLAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. A 1a-24a) is reported at 588 F.2d 1078.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1979 (Pet. 2), and the court of appeals denied rehearing on March 13, 1979 (Pet. App. B 1b). The petition for a writ of certiorari was filed on April 12, 1979.

QUESTIONS PRESENTED

1. Whether the trial court improperly curtailed petitioner's cross-examination of a witness.

2. Whether the trial court correctly instructed the jury as to the weight to be given character evidence.

3. Whether the trial court improperly coerced a witness not to testify in behalf of petitioner.

4. Whether the trial court correctly instructed the jury that it could infer that petitioner was aware of certain facts if he deliberately sought to avoid knowledge of them.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on five counts of willfully attempting to evade income taxes for 1971-1975, in violation of 26 U.S.C. 7201. The district court sentenced him to serve five concurrent five-year terms of imprisonment. The court of appeals affirmed (Pet. App. 1a-24a).

The evidence at trial showed that petitioner, a physician, attempted to evade a total of $83,337.04 in taxes by concealing cash receipts from his medical practice in order to avoid reporting them on his income tax returns (Pet. App. 5a-6a). The government's principal witness was petitioner's ex-wife, Jeanette Callahan, who had originally brought the scheme to the attention of the Internal Revenue Service during a bitter divorce dispute with petitioner. Petitioner's defense sought to place the blame for the

concealment scheme upon his ex-wife and to establish that he did not know that the hidden cash payments were not reported as taxable income (Pet. App. 6a-7a).

ARGUMENT

1. Petitioner first contends (Pet. 9-10) that the trial court improperly curtailed his cross-examination of Jeanette Callahan on the subject of her bias against him. He claims that he should have been permitted to cross-examine her concerning monetary demands allegedly made by her attorneys upon petitioner during the divorce litigation.

But the court of appeals correctly held that the testimony sought by petitioner, which related to the actions and statements of Mrs. Callahan's attorneys (Tr. 658-664), would have been cumulative of other evidence of bias. The trial court permitted petitioner to explore fully Mrs. Callahan's own statements and conduct (Pet. App. 24a). This included allowing petitioner on surrebuttal to adduce evidence that Mrs. Callahan told others that if petitioner "didn't give her all she wanted when they talk[ed] about divorce that she would go to the IRS and tell everything" (Tr. 670; see also Tr. 675), and that she intended to "destroy" petitioner and see him "dead" or "in jail" (Tr. 670-671, 678, 711-712). It was also established that Mrs. Callahan had been an active participant in the tax evasion scheme (Tr. 592-634) and was testifying under a grant of immunity (Tr. 582-584). Her bias was "amply established" and was, in fact, admitted by the government in closing argument

(Pet. App. 24a). In these circumstances, the court of appeals correctly concluded that the trial court's limitation of petitioner's cross-examination was a proper exercise of its discretion. See *Alford* v. *United States*, 282 U.S. 687, 694 (1931); *United States* v. *Luna*, 585 F.2d 1, 6 (1st Cir. 1978), cert. denied, No. 77-6896 (Oct. 2, 1978).

2. Petitioner also contends (Pet. 11) that the district court improperly suggested to the jury that it could relegate character evidence to a subsidiary role, or disregard it entirely. But the court's instructions on character evidence were entirely proper. It charged the jury that character evidence "is to be considered with all the other evidence in the case in determining whether you think he is guilty or not" and that "[g]ood character is a positive substantive fact and may itself be sufficient to generate in your minds a reasonable doubt as to the guilt of the defendant so as to require an acquittal * * *" (Pet. App. 17a; Tr. 832-833).[1] As the court of appeals

[1] The district court's complete instruction on character evidence was as follows (Tr. 832-833):

> The defendant, ladies and gentlemen, has introduced what is known as character evidence. That evidence as to character is properly before the jury, not as a reason to acquit the defendant if you think he is guilty but to be considered along with all the other evidence in the case in determining whether you think he is guilty or not. Good character is a positive, substantive fact and may of itself be sufficient to generate in your minds a reasonable doubt as to the guilt of the defendant so as to require an acquittal, although without it the other evidence would be convincing as to guilt. If you should think from all the evidence that in spite of the evidence of good character the defendant did what he is charged with doing, then you ought to convict him. In other words a jury would not be authorized to acquit merely because of good character. Character evidence is to be considered along with all the other evidence in determining whether the defendant did what he is charged with doing.

properly held (Pet. App. 17a), these instructions provided the jury with the correct legal rule with respect to character evidence. See *Edgington* v. *United States*, 164 U.S. 361, 366 (1896).

3. At the close of the second day of trial, petitioner's counsel informed the court that the defense wished to call a Georgia state court judge, Paul C. Armitage, as a character witness. The court excused the jury and questioned Judge Armitage under oath concerning the circumstances underlying his proposed appearance as a character witness (Tr. 481-487). It then directed the witness' attention to Canon 2B of the Georgia Code of Judicial Conduct (231 Ga. at A-2 (1974)), which admonishes state judges "not [to] testify *voluntarily* as * * * character witness[es]" (emphasis supplied), and suggested to him that he should only testify if his appearance was truly in response to the subpoena and not, in fact, a voluntary appearance. The court clearly stated that the question of the propriety of testifying was one for the witness himself to decide (Tr. 481-487).

The witness chose not to reappear at the trial the next morning. Petitioner asserts (Pet. 12-14) that

the district court's inquiry improperly coerced the witness not to testify on his behalf.[2] But the record supports the court of appeals' conclusion (Pet. App. 23a) that "[T]he [district] court did not bar the testimony of Judge Armitage but let the Judge himself decide whether to testify." While the court suggested that the matter might better have been left to local bar authorities, it correctly held that the district court's interpretation of the judicial canon did not constitute reversible error (Pet. App. 22a-23a).

4. Finally, petitioner contends (Pet. 14-15) that the trial court erred in charging the jury that petitioner's knowledge of a fact could be inferred from proof that he had willfully blinded himself to the existence of the fact.[3]

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[2] Petitioner also suggests (Pet. 13) that the district court improperly set Judge Armitage's appearance for 9:00 a.m. the next day although Judge Armitage was then scheduled to preside over a trial in his own court. However, as the trial court noted (Tr. 487, 493), Judge Armitage's testimony was expected to be brief, and his state court trial, scheduled for 9:30 a.m., could have easily been postponed for a few minutes in the event that he could not return to the nearby state courthouse in time. It is therefore clear that the trial court's scheduling of Judge Armitage's testimony for 9:00 a.m. was not improper, and its rejection of petitioner's request for a continuance when Judge Armitage failed to appear was not an abuse of discretion.

[3] The court instructed the jury as follows (Pet. App. 8a):

> Now speaking further about knowledge, the element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact. It is entirely up to you as to whether you find deliberate closing of the eyes and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

The instruction is a correct statement of the law and has been approved by three circuits. See, *e.g.*, *United States* v. *Evans*, 559 F.2d 244, 245-246 (5th Cir. 1977); *United States* v. *Thomas*, 484 F.2d 909, 912-914 (6th Cir. 1973), cert. denied, 415 U.S. 924 (1974); *United States* v. *Sarrantos*, 455 F.2d 877, 880-882 (2d Cir. 1972). As the court of appeals concluded, the instruction in question properly informed the jury that if petitioner was, as he claimed, ignorant of the tax evasion scheme, he could not be found criminally liable "unless his ignorance was a conscious and purposeful effort to avoid knowing the obvious truth" (Pet. App. 11a).

Contrary to petitioner's assertion (Pet. 15), the court of appeals' approval of the jury instructions does not conflict with *United States* v. *Valle-Valdez*, 554 F.2d 911, 913-914 (9th Cir. 1977). There, the defendant was charged with possession with intent to distribute a large quantity of marijuana discovered in the trunk of the automobile he was driving and he claimed to lack knowledge that the vehicle contained marijuana. The court held that the trial judge should have informed the jury that it must

find that the defendant was aware of the high probability that the vehicle contained contraband before they could infer his knowledge of that fact. Consistent with *Válle-Valdez*, the trial court here instructed the jury that petitioner's willful blindness must stem from a deliberate refusal to see illegality which "would otherwise have been obvious to him" (Pet. App. 8a). The court of appeals therefore correctly concluded that the trial court's instruction here was in accord with *Valle-Valdez* (Pet. App. 9a-11a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General

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